Supreme Court, U.S.
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Supreme Court of the United States

OCTOBER TERM, 1970

No. 1245

HAROLD K. BAKER,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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1. The Government's Memorandum in Opposition mistakenly asserts that petitioner's "sole contention" is that the rule of *Bruton* v. *United States,* 391 U.S. 123 (1968), was violated by the admission of Roten's testimony concerning an extrajudicial confession by Gurule, the codefendant (Opp. 3). Petitioner also contended that he was denied "pre-*Bruton* protection" (Pet. 16) because—as the Government concedes—"the trial judge refused to give a limiting instruction concerning Roten's testimony" (Opp. 2-3). Petitioner cited that refusal as "clear error, even apart from the rule announced in the *Bruton* case" and on that basis asked a writ of certiorari, if the Court were to reverse *O'Neil* v. *Nelson, certiorari granted,* November 9, 1970, No. 336, This Term. (Pet 22-3)

The Government ignores the pre-*Bruton* question although it circuitously admits—as petitioner noted (Pet. 16-18)—that in light of "independent evidence," the jury could have concluded that Gurule's testimony implicated petitioner (Opp. 4, n.1). The Government wholly neglects the unattenuated circumstance that the jury's duty to consider Gurule's confession against petitioner was clearly signalled by the juxtaposition of the refusal of a limiting instruction as to Roten's testimony with the deliverance of such an instruction as to Skaggs' testimony (Pet. 12, 13, 17-18).[1]

2. On the *Bruton* issue, the Government concedes a conflict of circuits which this Court recognized by granting certiorari in *O'Neil* v. *Nelson, supra* (Opp. 3). It nevertheless asks this Court to deny petitioner a writ and to refuse to hold the case for the pending adjudication of *O'Neil* v. *Nelson.* The rationale is two-fold and lacks substance in both aspects. The first premise is the factual *ipse dixit,* unsupported by any evidentiary showing, that petitioner "was not implicated in any way by Gurule's admissions" (Opp. 4). As shown by our petition, however, the totality of the evidence points to the likelihood that "petitioner's [good faith] defense was crippled in the jury's eyes by Roten's damning testimony that Gurule extrajudicially confessed to bad faith" (Pet. 17).

The second premise is the doctrinal assertion—supported only by citation of a Memorandum in Opposition in *Gregg* v. *United States,* No. 878, Misc., O.T. 1969, a case ante-

[1] Skaggs was the other "supplier" who put Roten on Gurule's trail and his testimony, like Roten's, did not mention petitioner (App. 2; Pet. 12). Hence, the limiting instruction on Skaggs precludes any supposition that Roten's failure to mention petitioner led the jury to exclude Gurule's confession in deciding petitioner's case.

dating *O'Neil* v. *Nelson*—that *Bruton* has no application where the inculpatory effect of a codefendant's confession is occasioned by "independent evidence" (Opp. 4, n.1). There is no warrant in precedent or reason for supposing that *Bruton* commands isolated consideration of the incriminating impact of a codefendant's confession on a self-contained basis, divorced from the remaining evidence in the case. It must be assumed that the jury considered all the evidence against both defendants, at least insofar as not otherwise instructed.

3. The Opposition in *Gregg, supra,* itself distinguishes that case from this one. The Government there noted the lack of any objection to the admission of the confession and the absence of any request for a limiting instruction (Mem. in Opp., 878 Misc., O.T. 1969, p. 4). It further argued that Gregg's conviction rested on "a strong case without the use of the questionable confession" (*Id.* at 5). In this case not only did petitioner object to admission of the confession (Pet. 11), but the Government concedes the refusal of a limiting instruction and does not argue, or cite any evidence indicating, that there was "a strong case" against petitioner apart from Gurule's confession.

In fact, absent the confession, the case against petitioner was thin at best. He freely acknowledged his supporting role in accepting requests from Gurule and other Santa Fe personnel, and in invoicing the Santa Fe, for substitute merchandise against purchase orders for railroad equipment. His defense, like Gurule's, was a good faith belief that the practice was authorized—entitling him to acquittal if accepted by the jury, as the Court charged (Pet. 13). Petitioner's defense was fortified by the testimony of Hills' president, as a Government witness, that the substitution practice was authorized by the Santa Fe (Pet. 5-6), and the admission of Santa Fe officials, also called by the Gov-

ernment, that "bootlegging" was openly practiced by the railroad's procurement personnel (Pet. 7-8). Unlike Gurule, petitioner was not a Santa Fe employee chargeable with first-hand knowledge of the railroad's procurement policies. It follows that petitioner's defense was incalculably damaged by the admission against him of Gurule's knowledgeable confession that the substitution practice was unauthorized. The damage was compounded when Gurule's credibility in denying the confession was destroyed (Pet. 21).

CONCLUSION

For reasons stated herein and in the petition, a writ of certiorari should be granted. In view of the Government's failure to offer any substantial defense of the District Court's failure to give the limiting instruction, certiorari should be granted independently of this Court's resolution of the conflict of circuits posed in *O'Neil* v. *Nelson, supra.*

Respectfully submitted,

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